

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition of Qwest Communications International Inc.	)	WC Docket No. 05-333
for Forbearance from Enforcement of	)	
the Commission's Dominant Carrier Rules	)	
as They Apply After Section 272 Sunset	)	
Pursuant To 47 U.S.C. § 160	)	

**REPLY COMMENTS OF  
ADHOC TELECOMMUNICATIONS USERS COMMITTEE**

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## SUMMARY

Local telecommunications markets are not sufficiently competitive for market forces to discipline the ILECs' pricing and services. Accordingly, the FCC must maintain a regulatory regime for local and interexchange services that protects enterprise customers and mass market consumers from anticompetitive behavior.

The FCC has already initiated the *ILEC Separate Affiliate Dominant/Non-Dominant Rulemaking* specifically to address the very issues in Qwest's petition. The petition is a transparent attempt to, at best, impose an artificial deadline on an existing rulemaking and, at worst, preempt the rulemaking altogether. The Commission should resolve the issues in the rulemaking by imposing safeguards and regulatory protections against carrier efforts to impede competition and exploit customers. Qwest's premature bid for forbearance from such protections must be denied.

Qwest's petition fails to make the showing required to satisfy the statutory standard for forbearance. Under that standard, the Commission can only forbear from regulation where such regulation is not required to ensure just and reasonable prices and practices, to protect consumers, and to service the public interest. Qwest cannot satisfy that standard because its markets are not sufficiently competitive to discipline its pricing and services. In pleading after pleading with the FCC, AdHoc has repeatedly demonstrated that effective competition for local exchange and exchange access services has simply failed to materialize, despite the competitive hopes and vision of Congress and the

FCC ten years ago. Accordingly, the FCC cannot sweep away all regulatory oversight affecting Qwest's exchange, exchange access, and in-region IXC services and still ensure that the statutory objectives of the Communications Act are met.

AdHoc demonstrated Qwest's supra-competitive pricing most recently in the *Special Access Rulemaking*. Where ILECs, including Qwest, have been granted Phase II pricing flexibility, they have invariably increased, not decreased, their prices for broadband services. In many cases, those prices are now higher than the prices charged by the same carriers in geographic areas still regulated under price caps.

Qwest's supports its claim that it faces competition with "facts" that are suspect, misleading, or just plain false, for a variety of reasons. The information filed with the FCC, in which Qwest claims to be losing business to competitors, is suspect because it differs significantly from the information Qwest provides to the investment community, in which Qwest claims to be expanding its market share. Qwest's claim that its retail base is shrinking is based on line counts that ignore customers of its DSL services and percentages that are artificially reduced by assuming that wireless customers do not keep their wireline service.

Meanwhile, Qwest continues to maintain a virtual monopoly on special access services. As a result of the FCC's premature de-regulation of that service, Qwest has increased its prices 56% and earned exploitive rates of return on special access services for the past five years. Qwest's reported rate of return on special access services for 2004 (the last year for which data is

available) was 76.8%, up from 68 % in 2003, 57% in 2002 and 46% in 2001. It has raised prices

So long as Qwest's local markets remain non-competitive, the Commission must continue to regulate Qwest's services if Qwest chooses to eliminate the structural separation of its local and long distance operations which justifies the current non-dominant treatment of its long distance services.

At a minimum, the Commission must ensure that it can still detect and prevent price squeeze strategies based on Qwest's continuing control of in-region access services. The most effective measure for preventing toll service/access service price squeezes is to ensure that access prices are at competitive levels. The Commission must take concrete steps to achieve cost-based access charges before it can grant the forbearance Qwest is seeking. At a minimum, this means the Commission must complete the *Special Access Rulemaking* before it allows Qwest to provide integrated long distance services on a completely unregulated basis.

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TELECOMMUNICATIONS USERS COMMITTEE**

The AdHoc Telecommunications Users Committee (the "AdHoc Committee") submits these Reply Comments pursuant to the Commission's December 8, 2005 Public Notice in the docket captioned above<sup>1</sup> regarding Qwest's petition for forbearance from dominant carrier regulation of its in-region, interstate, interLATA interexchange services ("in-region IXC services") after the separate subsidiary requirements of Section 272 of the Communications Act expire.

**INTRODUCTION**

The members of AdHoc are among the nation's largest and most sophisticated corporate buyers of telecommunications services. AdHoc's members include eleven "Fortune 100" companies and sixteen "Fortune 500." Committee members come from a broad range of economic sectors

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<sup>1</sup> *Pleading Cycle Established For Comments On Qwest's Petition For Forbearance From Enforcement Of The Commission's Dominant Carrier Rules as They Apply After Section 272 Sunsets*, WC Docket No. 05-333, Public Notice, DA No. 05-3163 (rel. Dec. 8, 2005).

(manufacturing, financial services, insurance, retail, package delivery, and information technology) and maintain thousands of corporate premises in every region of the country. Their combined annual spend on communications services is between two and three billion dollars per year. As substantial, geographically-diverse end users of telecommunications service nation-wide, AdHoc members are uniquely qualified to provide a credible, unbiased, and informed perspective on the state of competition in telecommunications markets.

AdHoc admits no carriers as members and accepts no carrier funding. AdHoc members therefore have no commercial self-interest in imposing unnecessary regulatory constraints on incumbent service providers. Indeed, as high-volume purchasers of telecommunications services, AdHoc members have historically been among the first beneficiaries of the FCC's de-regulatory efforts. As a consequence, AdHoc has consistently advocated de-regulation for telecommunications services as soon as a service market becomes competitive.

But local telecom markets are not yet sufficiently competitive for market forces to discipline the ILECs' prices and stimulate demand-responsive service innovation. As a result, ILECs have the ability to leverage their market power in the local exchange and exchange access markets to obtain anti-competitive advantages in long distance markets and disrupt the development of competition. Accordingly, the FCC must protect enterprise customers and mass market consumers from the supracompetitive prices and sluggish carrier performance that would result if the Commission prematurely removed all regulatory requirements for the ILECs' services. In particular, the Commission must ensure

that its regulatory regime for both local and long distance markets reflects the competitive realities of those markets and their interdependence as a practical matter.

As Qwest concedes in its petition, the FCC has already initiated the *ILEC Separate Affiliate Dominant/Non-Dominant Rulemaking*<sup>2</sup> specifically to address the very issues raised in the petition. Qwest's petition therefore triggers the statutory deadline in Section 10 while adding nothing substantive to the Commission's consideration of these issues. Moreover, the petition seeks relief from regulatory requirements that are only hypothetical; because of Qwest's structural separation for its in-region IXC services, those services are already classified as non-dominant. Qwest's petition is thus a transparent attempt to override the Commission's scheduling priorities and resource allocations by, at best, imposing an artificial deadline on an existing rulemaking and, at worst, preempting the rulemaking altogether. As Comptel points out in its Comments,<sup>3</sup> the Commission has previously rejected attempts to hijack the rulemaking process by triggering Section 10 deadlines with forbearance petitions seeking prophylactic relief from regulation that is only hypothetical.

AdHoc agrees with AT&T's comments in the instant docket<sup>4</sup> that, in lieu of diverting the Commission's limited resources to Qwest's frivolous petition, which

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<sup>2</sup> *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, and *2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, CC Docket No. 00-175, Further Notice of Proposed Rulemaking, 18 FCC Rcd 10914 ("*ILEC Separate Affiliate Dominant/Non-Dominant Rulemaking*").

<sup>3</sup> Opposition of Comptel (Jan. 23, 2006) at 4-6.

<sup>4</sup> Comments of AT&T Inc. (Jan. 23, 2006) at 1-2.



is merely repetitive of issues in the *ILEC Separate Affiliate Dominant/Non-Dominant Rulemaking*, the Commission should resolve those issues in that rulemaking, based on the more comprehensive scope and evidentiary record in that docket. If Qwest believes that the record in that docket is stale, it is free to ask the Commission to refresh the record with an additional round of pleadings.

Qwest's preemptive attempt to begin a new proceeding, instead of relying on or refreshing the factual record in the *ILEC Separate Affiliate Dominant/Non-Dominant Rulemaking*, is certainly understandable. Competitive conditions for enterprise customer services have only deteriorated in Qwest's local exchange and exchange access markets since the initiation of the *ILEC Separate Affiliate Dominant/Non-Dominant Rulemaking*. Because enterprise customers face no effective competition, AdHoc's Comments and Reply Comments in the *Rulemaking* urged the Commission to impose safeguards and regulatory protections to protect consumers from carrier efforts to impede or restrict competition for their in-region IXC services. Those protections are still necessary. Qwest's premature bid for forbearance from such protections must be denied.

#### **I. QWEST'S PETITION DOES NOT MEET THE STANDARD FOR SECTION 10 FORBEARANCE**

Under the forbearance provisions in Section 10 of the Communications Act,<sup>5</sup> the Commission cannot forbear from regulation unless it first determines that regulation is not required to ensure just, reasonable, and non-discriminatory

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<sup>5</sup> 47 U.S.C. § 10.

charges, practices, classifications, or regulations; that regulation is not necessary to protect consumers; and that forbearance would be consistent with the public interest.<sup>6</sup> For the reasons identified in AdHoc's comments<sup>7</sup> and reply comments<sup>8</sup> in the *ILEC Separate Affiliate Dominant/Non-Dominant Rulemaking* and in subsequent proceedings examining the state of competition in telecommunications markets, the Commission cannot conclude that the requirements of Section 10 are met under the current marketplace conditions in Qwest's region.

#### A. Local Markets Are Not Effectively Competitive

AdHoc has repeatedly demonstrated that effective competition for the local exchange and exchange access services used by enterprise customers has simply failed to materialize, despite the competitive hopes and vision of Congress and the FCC ten years ago.<sup>9</sup> The extremely limited competitive alternatives

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<sup>6</sup> 47 U.S.C. § 10(a)(1-3).

<sup>7</sup> *ILEC Separate Affiliate Dominant/Non-Dominant Rulemaking*, Comments of AdHoc Telecommunications Users Committee, filed June 30, 2003.

<sup>8</sup> *ILEC Separate Affiliate Dominant/Non-Dominant Rulemaking*, Comments of AdHoc Telecommunications Users Committee, filed July 28, 2003.

<sup>9</sup> See, e.g., Comments of AdHoc Telecommunications Users Committee (Jan. 22, 2002) at 2-3, filed in *Performance Measurements and Standards for Interstate Special Access Services*, CC Docket Nos. 01-321, 00-51, 98-147, 96-98, 98-141, 96-149, 00-229, Notice of Proposed Rulemaking, 16 FCC Rcd 20896 (2001) ("Performance Standards rulemaking"); Comments of AdHoc Telecommunications Users Committee (Mar. 1, 2002) at 14-17, filed in *Review of Regulatory Requirements for Incumbent LEC Broadband Services; SBC Petition for Expedited Ruling That It Is Non-Dominant in its Provision of Advanced Services and for Forbearance From Dominant Carrier Regulation of These Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001) ("Broadband Regulation Rulemaking"); Reply Comments of AdHoc Telecommunications Users Committee (Jul. 1, 2002) at i, filed in *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket Nos. 02-33, 95-20, and 98-10, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) ("Broadband Wireline Internet Access Rulemaking"); Comments of AdHoc Telecommunications Users Committee (Dec. 2, 2002) at 5, filed in *AT&T Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM No. 10593 ("AT&T Special Access Rulemaking Petition"); Comments of AdHoc Telecommunications Users Committee (Jun. 30, 2003) at 6, filed in *Section 272(f)(1) Sunset of the BOC Separate Affiliate*

available to business end users – and to the IXC's who provide long distance services to them – have proven to be wholly insufficient to discipline the BOC's' prices for access service or to protect end users from unjust and unreasonable prices, terms, and conditions for those services. These competitive conditions create rich opportunities for the ILECs to restrict or impede competition in the market for in-region IXC services by leveraging their competitive position in local services markets to the benefit of their long distance operations. Accordingly, the FCC cannot sweep away all regulatory oversight affecting the ILECs' exchange, exchange access, and in-region IXC services and still ensure that the statutory objectives of the Communications Act are met.

AdHoc's pleadings in the *ILEC Separate Affiliate Dominant/Non-Dominant Rulemaking* described a number of factors which demonstrate that effective competition has failed to develop in local exchange and exchange access markets:

- The Commission's deregulation of Qwest's prices for special access services (which are crucial inputs for long distance competitors) has resulted in price *increases* for those services, despite record earnings by

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*and Related Requirements*, WC Docket No. 02-112, and *2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, CC Docket No. 00-175, Further Notice of Proposed Rulemaking, 18 FCC Rcd 10914 (2003) ("*ILEC Separate Affiliate Dominant/Non-Dominant Rulemaking*"); Reply Comments of AdHoc Telecommunications Users Committee (September 23, 2004) at 3-14, *filed in Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, FCC 05-170 (rel. Dec. 2, 2005) ("*Qwest Omaha Forbearance Petition*"); Reply Comments of AdHoc Telecommunications Users Committee (May 10, 2005) at pp. 8-18, *filed in SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65 ("*SBC/AT&T Merger Prodeeding*"); Comments and Reply Comments of AdHoc Telecommunications Users Committee (June 13, 2005 and July 29, 2005), *filed in Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) ("*Special Access Rulemaking*").

Qwest, a result that is fundamentally inconsistent with the outcome of a market with effective competition.<sup>10</sup>

- AdHoc's members – who are the first customers new entrants would seek out – have in fact experienced few competitive alternatives for their exchange and exchange access service requirements.<sup>11</sup>
- Intermodal competition via cable modem service is not a factor for large business users due to the limited deployment of cable infrastructure in business areas and the severe security and reliability concerns raised by cable-based services and technologies.
- Meanwhile, the capital markets for competitive LECs ("CLECs") as a whole have crumbled over the past few years, driving many CLECs out of the market or into bankruptcy and placing severe restrictions on the ability of the few remaining CLECs to stay in the market, let alone expand their service capabilities.

The first of these factors – ILEC increases in access prices in response to pricing flexibility under the Commission's rules – is a particularly troubling competitive barometer. As AdHoc has repeatedly pointed out in the pleadings cited in note 9, *supra*, steep price increases in markets where the Commission has granted Qwest and other ILECs Phase II pricing flexibility under Section 69.701, *et seq.* of the rules<sup>12</sup> are an outcome exactly opposite to what a competitive market would produce. It confirms that Qwest operates in markets in which it is maintaining its legacy market power.

AdHoc's initial analysis of Qwest's and other ILECs' pricing behavior was first amplified by AT&T when it submitted additional evidence and analysis in

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<sup>10</sup> See discussion of Qwest's in-region pricing practices in Section I.C., *infra*.

<sup>11</sup> See Comments and Reply Comments of AdHoc Telecommunications Users Committee (June 13, 2005 and July 29, 2005), Attachments A and B, *filed in Special Access Rulemaking*, note 9, *supra*.

<sup>12</sup> 47 C.F.R. §§ 69.701 *et seq.*

support of its petition for reform of ILEC special access rates.<sup>13</sup> More recently, AdHoc documented and updated its analysis of Qwest's supra-competitive pricing in AdHoc's Comments and Reply Comments in the *Special Access Rulemaking*.<sup>14</sup> As the record in that proceeding demonstrates, where ILECs have been granted Phase II pricing flexibility, they have invariably increased, not decreased, their prices for high capacity services; in many cases, those prices are now higher than the prices charged by the same ILECs in geographic areas still regulated under price caps.

In the absence of competitive alternatives, enterprise networks (and large users generally, including Qwest's IXC competitors) are dependent upon Qwest's access services and are particularly vulnerable to anti-competitive price increases or other attempts to leverage local service market power in order to gain an anti-competitive advantage or fund anti-competitive practices in long distance markets. As the Commission itself observed in the Notice of Proposed Rulemaking for the *ILEC Separate Affiliate Dominant/Non-Dominant Rulemaking*, a grant of pricing flexibility under the Commission's pricing flexibility rules is not based upon a finding of non-dominance for a carrier's access services. Thus, carriers like Qwest who are dominant in their local markets can nevertheless obtain pricing flexibility, based in many cases upon the co-location of a CLEC who subsequently went out of business. Because local services are crucial

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<sup>13</sup> See *Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM 10593, filed October 15, 2002, ("AT&T Special Access Petition").

<sup>14</sup> Comments and Reply Comments of AdHoc Telecommunications Users Committee (June 13, 2005 and July 29, 2005) filed in *Special Access Rulemaking*, note 9, *supra*.

inputs for the long distance carriers who compete with Qwest's in-region long distance services, Qwest's continuing dominance in the market for local exchange and exchange access services creates both the opportunity and powerful incentives for it to engage in anti-competitive practices absent regulatory oversight by the Commission.

### **B. Qwest's Evidentiary Support For Its Petition Is Fundamentally Flawed**

In support of its Petition for forbearance, Qwest argues that rampant competition and declining market share throughout its region will ensure that the forbearance it is requesting meets the statutory standard, *i.e.*, competition strong enough to reduce Qwest's market share will also ensure just, reasonable, and non-discriminatory charges, practices, classifications, or regulations; make regulation unnecessary to protect consumers; and therefore be consistent with the public interest. Qwest's sole support for its claims is a declaration from Mr. David Teitzel, Qwest's "Staff Director-Public Policy"<sup>15</sup>. BellSouth and AT&T make similar claims though they do not support them with evidence or expert declarations.<sup>16</sup>

As the analysis below demonstrates, however, the actual competitive climate in Qwest's territory is neither "evolving" as "rapidly" as Mr. Teitzel claims nor is it as "robustly" competitive. In fact, close review of the data presented by Mr. Teitzel reveals the contrary to be true: the market power of Qwest's

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<sup>15</sup> Declaration of David L. Teitzel, November 22, 2005.

<sup>16</sup> Comments of BellSouth (Jan. 23, 2006) at 3-4; Comments of AT&T (Jan. 23, 2006) at 2-3.

competitors has eroded, and Qwest's supposed loss of lines to competitors has not only slowed down but has, in fact, reversed. The "facts" supporting Mr. Teitzel's conclusions turn out to be suspect, misleading, or just plain false, for a variety of reasons.

First, and most notably, the information Qwest provides to the FCC in support of its petition is suspect because it differs significantly from the information Qwest recently provided to investors and analysts in the investment community. To the FCC, Mr. Teitzel reports that "[w]hile competitive local exchange alternatives have enjoyed significant customer growth, Qwest's retail access line base has declined significantly"<sup>17</sup> between December, 2000 and September, 2005. But Qwest's most recent briefing to its investors reported the opposite. To investors, Qwest's most recent quarterly briefing touts the fact that the downward trend has stopped, and Qwest is once again experiencing *gains*. In a news release dated February 14, 2006 – less than two weeks ago – Qwest reported that "[m]ass market results reflect the success of new bundles launched earlier this year. ... The company ended 2005 with more customer connections than it began the year."<sup>18</sup>

Qwest's factual information in support of its forbearance petition is also misleading. Qwest claims that its "retail access line base" is shrinking. As measured by Mr. Teitzel, however, the alleged shrinkage in Qwest's "retail access line base" is not a valid indicator that Qwest has lost any customers at all,

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<sup>17</sup> Teitzel Declaration at para 3.

<sup>18</sup> Qwest NEWS, "Qwest reports solid fourth quarter results: EPS break-even before special items; margin expansion; improved year-over-year revenue," dated Feb. 14, 2006.

much less to competitors. This is because Mr. Teitzel's methodology counts as a "loss" any customer who continues to be a Qwest subscriber but substituted Qwest DSL service for a second dial-up line as a home computer connection.

Thus, under Mr. Teitzel's methodology, a single household's purchase of two phone lines in 2000 – one for family voice use and one for use as a dial-up modem connection – is counted as two access lines. If, as Qwest introduced DSL service during the intervening six years, the family dropped its dial-up modem line and purchased Qwest's DSL instead, Mr. Teitzel's count would treat that as *one lost access line*, even though the family is still purchasing two services from Qwest and Qwest is providing those services over the same copper line that Qwest previously used to provide the dial-up modem service. Indeed, the family is still turning to Qwest for *all* of its communications needs.

A review of the data reveals that all but about a quarter of Mr. Teitzel's reported "loss" is actually a migration to *other* Qwest services, such as DSL, or to Qwest-provided wholesale services and does not in any way represent a net "loss" to Qwest. Table 1 below details access line changes documented by Qwest over the period covered in Mr. Teitzel's declaration.



<b>TABLE 1</b>		
<b>Qwest Lines (Retail, Wholesale, Broadband)</b>		
(excluding wireless and special access)		
(000s)		
	Dec-00	Sep-05
Mass Market (Res and Small Business)	11,948	10,702
Business(1)	6,141	2,475
Resale		1,756
UNE-P		977
DSL	255	1,340
<b>TOTAL</b>	<b>18,344</b>	<b>17,250</b>
(1) Dec-00 "Business" lines include wholesale.		
Source: Qwest 10 Q for 4 Q 2001 (reporting current quarter and "prior 12 month" data, and Qwest 10 Q for 3 Q 2005.		

Retail access lines are but one category of "line" service that Qwest sells to its customers. As Table 1 demonstrates, the overall decline in services sold by Qwest over its subscriber loop plant in the five year period discussed by Mr. Teitzel was just slightly over 1 million lines, or 1% per year – hardly a "rapid evolution" or "significant decline." Moreover, as Qwest's own documents report, this "trend" has been reversed. Qwest's investor report from two weeks ago states that "[a]ccess line trends improved year-over-year in both mass market and business retail channels."<sup>19</sup>

Teitzel's pessimistic report also fails to take into account the increase in

<sup>19</sup> Qwest NEWS, "Qwest reports solid fourth quarter results: EPS break-even before special items; margin expansion; improved year-over-year revenue," dated Feb. 14, 2006 at 3.

voice-grade equivalent (“VGE”) access lines sold by Qwest during the same five year period.<sup>20</sup> During the period analyzed above, in which the total access line count dropped by a little over a million lines, the number of voice-grade equivalent circuits sold by Qwest increased by 47 million, a 100% increase. Qwest reported 47.6-million VGEs in December 2000, and 95.3-million in September 2005.<sup>21</sup> The correspondence between VGE’s and access lines is not a one to one correlation, of course, because an additional residential access line is treated as the addition of a single VGE while an additional DS1 enterprise customer access line would be treated as an additional 24 VGEs. Nevertheless, a 100% increase indisputably represents real growth in the both the quantity and capacity of access line services being sold by Qwest.<sup>22</sup>

Mr. Teitzel’s declaration next refers to the “ever-increasing number of customers” purchasing “alternative” communications options, citing data produced by TNS<sup>23</sup> purporting to show that Qwest’s *percentage share* of “residential communications connections” in the Qwest region dropped from 59%

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<sup>20</sup> VGE’s represent the total bandwidth being provided over Qwest facilities, and should include not only traditional analog voice lines and DSL lines, but also “special access” lines used primarily by enterprise customers for either voice, data or a combination of the two.

<sup>21</sup> Qwest 10Q’s for the 4<sup>th</sup> Quarter of 2001 and 3<sup>rd</sup> Quarter of 2005, .

<sup>22</sup> . There are two major types of business telephone services, “switched” access lines – similar to residential voice service lines and purchased most often by small businesses – and “special” access lines – higher-capacity connections requiring a piece of equipment to split the transmission apart and provide individual “channels” on which phone calls can be made. Enterprise customers’ decisions to purchase switched or special access lines are dictated by traffic volumes, bandwidth needs, and relative prices of facilities. In discussing competitive losses, it makes no sense to look at the decrease in switched access lines in isolation from the changes in demand for special access services occurring during the same interval of time.

<sup>23</sup> TNS is a private data analysis firm that analyses customer billing information to identify marketplace trends. TNS does not make its data freely available for independent review and analysis.

in the fourth quarter of 2000 to 36% in the second quarter of 2005.<sup>24</sup> Mr. Teitzel maintains that it is “difficult” to measure this change in connection share using anything but the kind of data produced by firms such as TNS. Unfortunately, TNS data is not replicable and cannot be tested for validity so it is impossible to evaluate whether it is credible. It is possible, however, to evaluate whether it is probative and on that basis, the data proves to be of little utility.

The TNS data supposedly show that Qwest’s share of residential “connections,” as TNS has measured them, was as low as 59% in 2000, and had actually declined to 36% in the middle of 2006. But these declining percentages merely reflect the proliferation of “connections” during that period. In other words, the percentages cited by Mr. Teitzel reveal only the size of Qwest’s “slice” of the total connection “pie.” Because that pie has been growing, thanks to growth in new services like cellular phones and wireless PDAs which are purchased as additions rather than substitutes for traditional connections, Qwest’s share can shrink even when its customer base is increasing.

Consider, for example, that one of the primary drivers in the change in Qwest’s “share” of connections during this period is the huge growth in wireless lines that occurred during this time. Approximately 10-million additional wireless lines were added in Qwest’s serving territory between the end of 2000 and the end of 2004. Roughly 75% of those were likely to be residential lines since approximately 12-million wireless lines were reported in 2000 and approximately

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<sup>24</sup> Teitzel at 3.

22-million wireless lines were reported in 2004.<sup>25</sup> The *growth* in these lines alone during that period exceeds Qwest's total retail residential lines in service. If these additional "connections" were purchased as substitutes for Qwest's lines, one would expect them to replace, not supplement, Qwest's base of land lines. That is not what has happened, however.<sup>26</sup> As a result, Qwest's connection count, and its relative market power in the long distance business, have not changed significantly. Instead, consumers simply bought additional connections *of another service type*.

Because the base of connections for Mr. Teitzel's percentage calculation is so diverse, Qwest's percentage of that base has no relevance to the question of whether Qwest should be classified as dominant in the provision of in-region IXC services. It would only be a relevant barometer of Qwest's market success if, and only if, each "connection" in the total connection pool was equivalent to each pre-existing Qwest access connection in terms of its propensity to utilize long distance service. But Mr. Teitzel's declaration does not demonstrate that to be the case, nor could it since some unspecified portion (likely a majority) of the "connections" contained in the TNS data are not substitutes for access to long distance services, and as such have no relevance to the issue raised by Qwest's forbearance petition.

Even if the data did have some relevance, Qwest's more recent

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<sup>25</sup> FCC Local Competition Report, 2005. This data matches very closely to the data presented by Mr. Teitzel in Table 2 of his declaration.

<sup>26</sup> The tremendous popularity of 'family plans' with inexpensive equipment and low monthly rates for each additional handset is responsible for some of this growth. Wireless phones in the hands of middle-school and high school students who make no long distance calls have no legitimate place in the metrics the Commission needs to examine for this proceeding.

pronouncements to its investors reveal that Qwest's overall connection counts are increasing, not decreasing. Qwest reported that it "ended 2005 with more customer connections than it began the year," that December 2005 represented "the second sequential quarterly increase" in connections, and that connections were "up nearly 200,000 since new bundling and localized sales initiatives began in May 2005."<sup>27</sup> Two hundred thousand new connections represents a gain of about 1% in just 7 months.<sup>28</sup>

Misguidedly, Mr. Teitzel claims that "a wide range of CLECs are now actively offering competitive services to residential and business customers in Qwest's Region" and that CLEC end-user access lines have grown exponentially since 2000," citing various statistics regarding CLEC lines in service in Qwest territory between December 2000, and December 2004.<sup>29</sup>

Once again, while Mr. Teitzel's facts may be technically correct as far as they go, they are misleadingly incomplete and fail to support the position Qwest espouses in its petition. The snapshot of data included in the Teitzel Declaration is misleading because the strength, number and growth trajectory of CLECs in Qwest's territory has changed dramatically since the Declaration's last data point in December 2004. Mr. Teitzel represents in his declaration that "over 90 CLECs have executed QPP [Qwest Platform Plus] contracts with Qwest" as of September, 2005 and reports that "this means that resale, UNE-loop, QPP and

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<sup>27</sup> Qwest NEWS, "Qwest reports solid fourth quarter results: EPS break-even before special items; margin expansion; improved year-over-year revenue," dated Feb. 14, 2006.

<sup>28</sup>  $(200,000 / 17,250,000 \text{ total connections (Table 1)}) = 1.2\%$

<sup>29</sup> Teitzel Declaration at para 6.

facilities bypass competition all remain viable means by which CLECs may compete with Qwest's retail local exchange services."<sup>30</sup> But QPP contracts are simply the commercial interconnection agreements that replaced UNE-P arrangements in the wake of the Commission's decision eliminating such arrangements. The mere fact that CLECs executed QPPs with Qwest rather than abandoning their businesses on a flash-cut basis following the elimination of UNE-P is no indicator of CLEC health and vitality.

A more probative measure of CLEC health would be the trends in wholesale line purchases by CLECs in the time frame leading up to and following the December 2004 point at which Mr. Teitzel cuts off his analysis. It was during this time frame (in July 2004) that the largest of the CLECs in existence at the time – AT&T – announced that it would no longer solicit "mass market" customers.<sup>31</sup> It was also during this same time frame that the Commission issued its *Triennial Review Order on Remand ("TRRO")* (in February 2005).<sup>32</sup> In its 4<sup>th</sup> Quarter report to investors, Qwest indicated that, despite improved "trends in retail access lines," it was experiencing reductions in sales of lines to competitors and anticipated continuing reductions.<sup>33</sup> In other words, the access lines purchased by CLECs have ceased the "exponential" growth Mr. Teitzel

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<sup>30</sup> *Id.*

<sup>31</sup> AT&T News Release: June 23, 2004, *AT&T To Stop Competing In The Residential Local and Long-Distance Market In Seven States*, <http://www.att.com/news/2004/06/23-13121>.

<sup>32</sup> *Unbundled Access to Network Elements*, WC Docket 04-313, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Order on Remand (rel. Feb. 4, 2005) (*"TRRO"*).

<sup>33</sup> Qwest NEWS, "Qwest reports solid fourth quarter results: EPS break-even before special items; margin expansion; improved year-over-year revenue," dated Feb. 14, 2006 at page 3.

reported as of December 2004 and in fact have begun *declining*.

According to Qwest's 10Q reports filed with the SEC, UNE-P lines and their QPP replacements (which accounted for approximately 60% of CLEC lines nationwide in 2004 according to the FCC's own statistics<sup>34</sup>) provided by Qwest declined by approximately 15% in the 12 month period from their peak in the reporting period in which AT&T first announced its departure from the mass market, the period ending September 2004 to the end of September 2005. UNE-P sales dropped even more steeply, by another 4.5%, during just the last three months of 2005. In total, Qwest's competitors were purchasing (providing service over) 19% fewer UNE-P lines at the end of 2005 than 15-months prior to that time.<sup>35</sup>

The experience with "resale lines" is similar. Purchases of resale lines peaked in third quarter of 2004, declined by 8% in the following twelve months, and the decline accelerated in the last quarter of 2005 with yet another 2.5% drop. The combined drop in resale lines was 10% in 15 months.<sup>36</sup>

In his declaration, Mr. Teitzel also cites the current popularity of wireless services in Qwest territory and concludes that those services have caused a change in Qwest's long distance market power. Mr. Teitzel points to several anecdotal reports of customers "cutting the cord" and relying upon wireless service in place of wireline, as well as various estimates as to the percentage of customers that have done so to date, or that may do so in the future.

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<sup>34</sup> FCC *Local Telephone Competition Report*, released July 8, 2005, at Table 3.

<sup>35</sup> Qwest 10Q's for the 4<sup>th</sup> Quarter of 2001 and 3<sup>rd</sup> Quarter of 2005

<sup>36</sup> *Id.*

Once again, Mr. Teitzel data is unrelated to the issues raised by Qwest's petition. While it is true that there are many more wireless subscribers today than in 2000, the pertinent question is how many, if any, of those wireless subscribers use their wireless phones as a substitute for the landlines offered almost exclusively by Qwest. The answer is simply not clear.

Mr. Teitzel cites to the FCC's CMRS report and estimates that somewhere between 5% and 6% of wireless subscribers rely "solely" on wireless service.<sup>37</sup> But if only 6% of the population relies "solely" upon a wireless device, the remaining 94% of subscribers rely upon their landlines, hardly demonstrating a competitive threat. During the period when Mr. Teitzel points to the addition of 10-million wireless phones in Qwest's footprint<sup>38</sup>, only about 1-million (see Table 1 above) landline phones were disconnected. If, as Mr. Teitzel suggests, customers are "cutting the cord" and disconnecting additional access lines in favor of wireless service, then Qwest's landline connections should have dropped by an amount equivalent to the increase in wireless phones. But that simply has not happened. During this period, only one wireline phone has been retired for every 10 wireless phones added, meaning that 9 out of 10 phone subscribers who entered the wireless world during the period cited by Mr. Teitzel chose NOT

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<sup>37</sup> Teitzel Declaration at para 9. Other studies have estimated the "wireless only" subscriber number to be about half that level. See, for example, a recent paper presented at the American Association of Public Opinion Research presenting an independent, unbiased view of the extent of wireless substitution and its demographics. This study used data from the National Health Interview Survey, January-December 2003, the authors determined that 3.1% of civilian, non-institutionalized adults have only a wireless phone, and 3.7% of all households are wireless-only. Luke, Julian V., Blumberg, Steven J., and Cynamon, Marcie L., "The Prevalence of Wireless Substitution," presented at 59th Annual Conference of the American Association for Public Opinion Research, May 15, 2004; and updates from slide presentation.

<sup>38</sup> Teitzel Declaration at para 8.



to cut the cord.

Finally, Mr. Teitzel discusses the possibility that, *in the future*, VoIP-based services – which might or might not be provided by Qwest – could be used by current Qwest subscribers in place of Qwest’s current long distance service offering. Whatever the likelihood of that eventuality, it is irrelevant to the resolution of Qwest’s petition. By Mr. Teitzel’s own reporting, at least 95% of the customers in Qwest territory have broadband capability available to them today through cable modem offerings.<sup>39</sup> Qwest itself reports that DSL service is available to 77% of its households.<sup>40</sup> Yet the vast majority of customers do not subscribe to these offerings today and therefore cannot utilize VoIP services as a replacement for their Qwest voice services. If *future* mass market customers view non-Qwest-provided VoIP-based services as a viable substitute for Qwest’s traditional services, it will be appropriate to evaluate the impact of competitive VoIP on Qwest’s market power. But Mr. Teitzel’s reliance on VoIP *now* as a competitive alternative is premature.

### **C. Qwest’s Pricing Of Special Access Services Demonstrates Substantial Market Power**

Not surprisingly, neither Qwest’s Petition nor the initial comments of fellow BOCs BellSouth and AT&T focus on the direction of its special access service pricing and the tremendous market power exhibited by the BOCs for that service. As noted above, AdHoc has been complaining to the Commission for several

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<sup>39</sup> Teitzel Declaration at para 13.

<sup>40</sup> Qwest NEWS “Qwest reports solid fourth quarter results: EPS break-even before special items; margin expansion; improved year-over-year revenue” dated February 14, 2006. at page 4.

years now that the BOCs, including Qwest, continue to maintain a virtual monopoly on the provision of special access services to enterprise customers.<sup>41</sup> Moreover, AdHoc has repeatedly demonstrated that as a result of the Commission's pricing flexibility rules, the BOCs, including Qwest, have been steadily increasing their prices and earning exploitive rates of return on special access services for the past five years.

Qwest's reported rate of return on special access services for 2004 (the last year for which data is available) was 76.8%, up from 68 % in 2003, 57% in 2002 and 46% in 2001.<sup>42</sup> While regulatory data for 2005 earnings is not yet available, there is no reason to expect a change in the trend. Qwest's 4<sup>th</sup> Quarter 2004 financial reports revealed an increase in data service revenues (including special access) of 6% over 2004 levels.<sup>43</sup>

Qwest and the other RBOCs have, of course, disputed the relevance of these results – suggesting that they are only accounting anomalies and should be accorded no weight in the Commission's assessment of competition. AdHoc, however, continues to disagree. Service providers in a competitive market would not be able to price their services at such excessive levels.

Qwest's pricing behavior corroborates the earnings evidence. Qwest has demonstrated both the will and the ability to raise prices significantly wherever they are not regulated by the Commission. For example, after Qwest obtained

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<sup>41</sup> See pleadings cited in note 9, *supra*.

<sup>42</sup> Data developed from FCC ARMIS Report 43-04, Table 1, for each year.

<sup>43</sup> Qwest 4<sup>th</sup> Quarter 2005 financials, [http://www.qwest.com/about/investor/financial/files/ Statistical Profile 4Q05 FINAL.xls](http://www.qwest.com/about/investor/financial/files/Statistical_Profile_4Q05_FINAL.xls).

pricing flexibility for some of its MSA's in 2001 pursuant to the Commission's pricing flexibility rules, Qwest increased the prices for services in Phase II MSAs (those with full pricing flexibility) several times. By August of 2004, those price changes had resulted in a cumulative increase of 56% in the price of a 10-mile DS-3 circuit purchased on a month to month basis.<sup>44</sup>

Qwest has not only increased special access prices but it has been able to sustain those price increases over a multi-year period. Qwest filed its first price increase occurred almost four and half years ago, on November 1, 2001<sup>45</sup>. In the five years since then, Qwest has not only *sustained* that price but has increased it in February and August 2004.<sup>46</sup> At the same time that Qwest was implementing unprecedented price increases in the MSAs for which it had been granted pricing flexibility, Qwest was reducing prices in areas still regulated under the FCC's price caps plan. The difference that exists today between Qwest's price caps and pricing flexibility rates for a 10-mile DS3 circuit is close to 70%. A customer requiring such a circuit today in a Qwest price caps-regulated MSA would be billed \$3,520 per month. A customer requiring an identical circuit in areas that are subject to the Commission's Phase II pricing flexibility rules would be billed \$5,900 – a price that is \$2,380 per month *higher*. Figure 1 below illustrates similar Qwest pricing increases for DS1 circuits. As with the DS3 service, no competitive threat, real or "potential" has disciplined Qwest's pricing

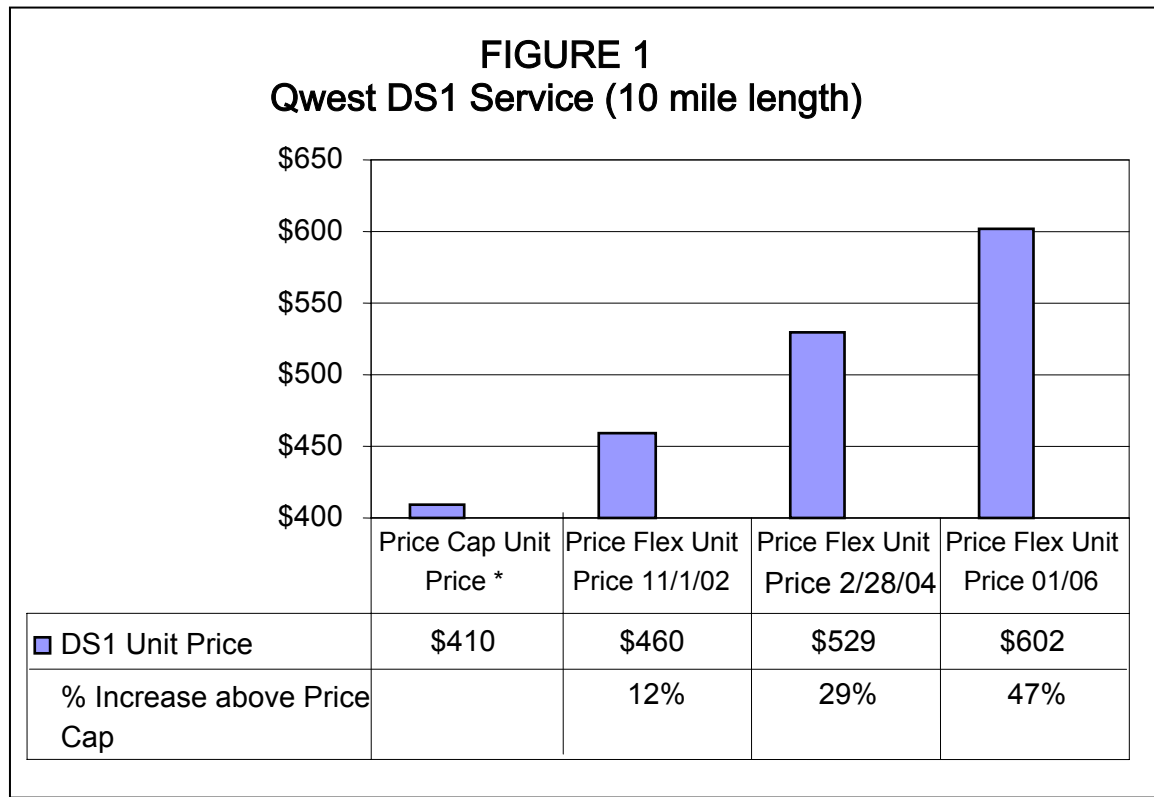
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<sup>44</sup> Qwest Corporation, FCC Tariff No. 1, Access Service, Section 17.2.12, Effective August 31, 2004, ("*Qwest Access Tariff*").

<sup>45</sup> See Qwest FCC Transmittal 145, effective November 1, 2001.

<sup>46</sup> See Qwest FCC Transmittals 186, effective February 28, 2004 and Transmittal 206, effective August 31, 2004. See *also* Petitions to Reject, Suspend and / or Investigate Transmittal 206 filed by AT&T, MCI and Time Warner Communications, filed August 23, 2004.

in the more than four years since pricing flexibility has been granted.



Qwest can only implement these price increases because it faces no significant competition in the provision of special access service. This was confirmed by data filed in CC Docket 01-338<sup>47</sup> by Qwest in 2004.<sup>48</sup> Qwest proffered “competitive” information to the Commission on the Denver metro area as a surrogate for the its entire territory, although the Denver metro area is probably not representative of the level of competitive entry in other, smaller markets. Nonetheless, even in Denver, Qwest reported that CLECs had “lit” (*i.e.*,

<sup>47</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 04-313, 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (“*TRO Remand Proceeding*”)(subsequent history omitted).

<sup>48</sup> Letter to Marlene H. Dortch, Secretary, FCC, from Cronan O’Connell, Qwest, *TRO Remand Proceeding* (filed August 20, 2004).

owned the facilities connecting to an individual building) only 979 commercial buildings. Qwest also reported that CLECs purchased 18,563 special access facilities to reach CLEC customers in 6,350 other commercial buildings in the Denver metro area. Thus, in the “best “competitive case Qwest could identify in its region, CLECs had competitive alternatives to Qwest’s special access service in only 13% of commercial buildings. In 87% of the buildings in Denver in which enterprise customers needed high-speed dedicated facilities, the only game in town was Qwest.<sup>49</sup>

## **II. DOMINANT CARRIER SAFEGUARDS ARE NECESSARY TO ENSURE THAT QWEST DOES NOT USE ITS MARKET POWER TO IMPEDE THE DEVELOPMENT OF EFFECTIVE COMPETITION**

In the *ILEC Separate Affiliate Dominant/Non-Dominant Rulemaking*, the Commission sought comment on regulatory requirements that would protect long distance markets from any anti-competitive harm that might occur once ILECs are able to provide in-region IXC services on an integrated basis with their regulated local exchange services.

The Commission noted that certain non-discriminatory provisioning and cost imputation requirements do not sunset when the Section 272 separate affiliate and related requirements sunset. But neither of those requirements has proven to be a particularly effective protection against anti-competitive harm.

The non-discriminatory provisioning requirement has failed to ensure adequate

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<sup>49</sup> The 13% is the ratio of CLEC “lit” buildings (979) to total buildings in which CLECs have commercial customers (979 + 6350). In reality, it is likely that the 13% is a very generous estimate and that there are many additional commercial buildings in Denver in which CLECs do not do business in any manner – buildings, for example, where enterprise customers utilize dedicated access facilities to connect to Qwest long distance services, or the services of other non-CLEC IXCs.

and timely provisioning of special access services, as evidenced by the record in the Commission's *Performance Standards Rulemaking*.<sup>50</sup> And the imputation requirement in Section 272(e)(3) has even more limited utility. It supposedly would prevent Qwest from setting prices for long distance services that are below the cost of applicable access elements, assuming timely enforcement and adequate cost information. But it does nothing to ensure that access prices are not unreasonably high to begin with. Nor does it stop Qwest from imposing anti-competitive and uneconomic price squeezes on competing IXCs in region by setting long distance prices that do not recover the incremental costs of service other than access costs. Moreover, Qwest can still engage in any number of other anti-competitive or discriminatory practices, other than price squeezes, without regulatory oversight.

Accordingly, so long as Qwest's local markets remain non-competitive, the Commission must continue to regulate Qwest's services if Qwest chooses to eliminate the structural separation of its local and long distance operations which justifies the current non-dominant treatment of its long distance services.

At a minimum, the Commission must ensure that it can still detect and prevent price squeeze strategies based on Qwest's continuing control of in-region access services. A narrowing of the price/cost margin for in-region IXC services is not *per se* anti-competitive, of course, nor does it necessarily indicate unlawful pricing by an ILEC; it can be no more than the efficiency-enhancing

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<sup>50</sup> *Performance Measurements and Standards for Interstate Special Access Services*, CC Docket Nos. 01-321, 00-51, 98-147, 96-98, 98-141, 96-149, 00-229, Notice of Proposed Rulemaking, 16 FCC Rcd 20896 (2001).

consequence of increased competition in the long distance market. But competition and consumers would be harmed if shrinking margins are imposed disproportionately upon Qwest's competitors solely because of above-cost pricing of the access services that Qwest continues to control.

The most effective measure for preventing toll service/access service price squeezes, while simultaneously improving the allocative efficiency of downstream long distance markets and ultimately bringing lower prices to end users for in-region IXC services, is to ensure that access rates are at their underlying economic cost levels. The Commission has on several prior occasions emphasized the importance of ensuring that ILEC access rates are at the cost-based levels that would ordinarily prevail in a fully competitive access services market.<sup>51</sup> Under those conditions, ILECs and IXCs will each be confronting roughly the same access costs, and will be able to compete on the basis of relative efficiency at converting wholesale access services, together with the value-added components, into a retail toll offering.

With the sunset of the Section 272 structural safeguards and the resulting opportunity and heightened incentive for Qwest to manipulate access rates and services to impede interexchange competition, cost-based and non-discriminatory access becomes crucial not only to emerging competition in Qwest's local markets but to the preservation of robust competition in long distance markets as well. Accordingly, the Commission must turn to the issue of

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<sup>51</sup> See, e.g., *Access Charge Reform*, CC Docket No. 96-262, First Report and Order, Reform Order, 12 FCC Rcd 15982, 16001-04, paras. 42-43 (1997).

cost-based access pricing and take concrete steps to achieve cost-based access charges before it can grant the forbearance Qwest is seeking. At a minimum, this means the Commission must complete the *Special Access Rulemaking* before it allows Qwest to provide integrated long distance services on a completely unregulated basis.

In pleadings filed in the *ILEC Separate Affiliate Dominant/Non-Dominant Rulemaking* and, more recently, in the *Special Access Rulemaking*, AdHoc identified a number of non-structural safeguards that would ensure ILECs are charging cost-based access rates.<sup>52</sup> Chief among these is the re-vitalization of price caps regulation for access services. As AdHoc described in its pleadings, the ILECs have used the pricing flexibility granted to them under the existing access rules to raise prices, confirming that significant countervailing competitive forces that might otherwise discipline market prices for access have simply failed to emerge. Accordingly, the Commission must first re-impose its “price caps”/incentive regulation to ensure just and reasonable prices in the access services market before it can grant Qwest’s forbearance petition.

In the Commission’s earlier proceedings related to broadband competition,<sup>53</sup> AdHoc emphasized that its members were supporting re-imposition of price caps/incentive regulation only reluctantly. AdHoc noted that its members stand to benefit the most from de-regulatory initiatives because, as large users of telecommunications, they have the buying power to extract

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<sup>52</sup> See pleadings cited in note 9, *supra*.

<sup>53</sup> See *Broadband Regulation Rulemaking* and *Broadband Wireline Internet Access Rulemaking*, cited in note 9, *supra*.



reasonable prices, terms, and conditions from the ILECs, and thereby push down market prices for all, when markets become competitive. And, as the biggest potential beneficiaries of de-regulation, AdHoc members have not been shy about demanding de-regulatory reform when market conditions justify it. But since those conditions simply aren't present in the access services market, the Commission must continue to enforce certain non-discrimination, pricing, and tariffing requirements for those services.

The imputation requirement in Section 272(e)(3) establishes a limited safeguard against anti-competitive pricing of long distance services by an ILEC if the ILEC eliminates structural separation and offers those services on an integrated basis. In order to detect and eliminate violations of the imputation requirement, however, the Commission must obtain data from the ILECs sufficient to police compliance. Accordingly, whether or not the Commission classifies Qwest as a non-dominant carrier, the Commission must adopt reporting requirements and revise its cost allocation rules to adequately monitor Qwest's pricing of long distance services and ensure compliance with the statutory standard.

## **CONCLUSION**

As heavy users of both local and long distance services, the members of AdHoc support the Commission's objective of encouraging robust, competitive, and unregulated markets for local and long distance services. But a realistic assessment of current competitive conditions in the local services markets leads inevitably to the conclusion that some non-structural safeguards are necessary

until local markets become more competitive. Where competition is too weak to protect consumers and competition from unjust and unreasonable rates, terms, and conditions or unreasonable discrimination , the Commission must intervene and adopt appropriate regulatory safeguards.

Respectfully submitted,

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February 22, 2006

### Certificate of Service

I, Michaelleen Terrana, hereby certify that true and correct copies of the preceding Reply Comments of AdHoc Telecommunications Users Committee were filed this 22d day of February, 2005 via the FCC's ECFS system and by email to:

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